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SUPREME COURT, U. S.

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No. 249

In the

Supreme Court of the United States

OCTOBER TERM, 1970

SCHMERLER FORD, INC., et al.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF FOR PETITIONERS

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The Solicitor General's contention that the Petition for Certiorari "raises only an evidentiary issue" is without validity:

It is not true that "the Board found * * * that there was no adequate basis in the record for concluding that these statements [as to price fixing] affected employee free choice." (Br. in Opp., p. 6.) *The Board never went into that subject.* On the contrary, the Regional Director, in his decision directing the elections held "Nothing in the [Labor] Act empowers the Board to pass judgment on whether the alleged anti-trust ramifications of a plan such as the one in question violates 'anti-trust' laws."

(App. 6a.) The Board refused to review that decision. (App. 18a.)

At no time, either in the underlying representation proceeding or in the ensuing unfair labor practice proceeding did the Board make the faintest finding that the price fixing promise did not affect employee free choice.

The Solicitor General has badly misread the record. The Board consistently refused to admit the illegality of the promise, much less its effect upon the election, while the majority of the Court of Appeals conceded the illegality of the promise but found, *all on its own*, that it did not affect the election.

Nor did the lead or concurring opinion in the Court of Appeals "agree" with a non-existent Board finding that these statements did not "affect" employee free choice. Those opinions promulgated the new doctrine that "There is no proof that the scheme won the election for the Union." (App. 37a.) That doctrine raises a basic legal, rather than a mere evidentiary, issue.

Proof that the scheme won the election could be made only by interrogating voters as to how they voted and why. The Brief in Opposition does not deny that such interrogation has been condemned by the Board and every Circuit that has passed on the question.

Finally, the Brief in Opposition refuses to face the question of whether it is proper for an agency of the Federal Government to lend its facilities for the incubation of a price fixing scheme.

The attempt to shrug off the Petition as raising an ordinary evidentiary issue flies in the face of the record. The Petitioner raises important questions of national policy.

Respectfully submitted,

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